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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 701.

UNITED STATES, *Petitioner*,

v.

HENRY ERICSSON COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Opinion Below.

The opinion of the Court of Claims (R. 54-59), has not been officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered on October 1, 1945 (R. 60). Petitioner invokes the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925, as amended.

Questions Presented.

1. Whether a construction contractor's acceptance of change orders extending the time relieves the Government of liability for its own inexcusable delays merely because the contractor completes the project within the extended time, despite the fact that the change orders did not substantially delay the job, had no relation to the Government's inexcusable delays, and were not intended by either party to compromise or waive any claims arising from such inexcusable delays.

2. Whether damages for the Government's delays properly include a proportionate share of the contractor's general office expense for the period of such delays.

3. Whether, in order to recover the rental value of its equipment rendered idle by the Government's delays, the contractor must prove some other planned use for the equipment during the period of such delays.

Statement.

Respondent, a construction contractor, on September 3, 1936, entered into a contract with the United States, acting through the Federal Emergency Administration of Public Works, to construct 17 apartment buildings in the Julia Lathrop Homes, in Chicago, for $2,097,600.00, the work to be completed within 365 days after receipt of notice to proceed. Notice to proceed was received September 23, 1936, thereby fixing September 22, 1937, as the contract completion date (Fdgs. 1, 2, and 3; R. 28-29).

The contract required the contracting officer to furnish detail drawings where necessary (Fdg. 8; R. 31). Among these were the detail drawings for stone trim (Fdg. 11, R. 32). The contract required the contractor to submit shop drawings for the stone trim, to be approved by petitioner (Fdgs. 9 and 10; R. 32). To prepare such shop drawings respondent first had to have the detail drawings (Fdg. 11, R. 32). Petitioner failed to furnish detail drawings for the

stone trim in the ordinary and usual course (Fdg. 12; R. 33). To minimize such delay, respondent prepared shop drawings in the absence of such detail drawings and submitted them for approval. Petitioner failed to approve these shop drawings in the ordinary and usual course and would approve none of them until after it had finally given detail drawings to respondent (Fdg. 13; R. 34-35). Due to petitioner's delay in furnishing detail drawings for the stone trim, and to its failure to cooperate in respondent's efforts to secure approval of shop drawings in the absence of such detail drawings, completion of the entire job was delayed at least 47 days (Fdg. 14; R. 35).

The specifications provided for steam tests of the heating system when it had been completed, the steam to be furnished by petitioner (Fdgs. 17 and 18; R. 36). Article 6 of the contract provided that all tests by the government should be performed in such manner as not to unnecessarily delay the work (R. 8). The contract work could not be completed until after the steam tests had been made and approved (Fdg. 23; R. 38). Respondent was ready to make such tests on September 13, 1937, and so notified petitioner, but the latter did not furnish steam until October 13, 1937, 3 weeks after the contract completion date (Fdgs. 19 and 20; R. 37). Due to such delay, completion of the entire job was delayed an additional 17 days (Fdg. 23; R. 38).

The court below held that petitioner's delays in furnishing detail drawings and in furnishing steam constituted breaches of contract (R. 55-57).

Petitioner issued certain change orders under the contract, extending the time for completion 74 days. Respondent has been paid the contract price as adjusted by such change orders (Fdg. 1; R. 28). Some of these change orders involved new and different work and one merely extended the time because of a strike. There was no relation between these change orders and the delays which the court below held were breaches of contract. The changes covered by these orders did not delay completion of the work by 74

days or any other substantial period of time (R. 58). These change orders were agreed to by respondent without protest, each one containing the following clause:

> "This Change Order expressly satisfies any and all claims against the United States of America and the United States Housing Authority of whatever nature or purpose incidental to or as a consequence of the change herein described (Fdg. 43; R. 53)."

In agreeing to the change orders neither party intended that any disputes arising under the contract, and not relating to the subject matter of the change orders, should be compromised or waived by the granting or accepting of the change orders (Fdg. 43; R. 53-54). The job was completed within the contract time as thus extended, being accepted by petitioner as of December 3, 1937 (Fdgs. 2, 35 and 36; R. 28, 47, 49).

The court below entered judgment for respondent for $42,306.34, on account of defendant's delays (R. 54, 59 and 60). Included in this sum was $11,433.60, being the share of home office overhead allocable to this job for the period of the delays upon the basis of job costs (Fdgs. 29-30; R. 42-44).

Also included as damages was $1,645.00, being one-half of the reasonable rental value of certain items of respondent's equipment which it was obliged to keep on the job 47 days longer than would otherwise have been necessary had petitioner not delayed the work. The full reasonable rental value was reduced by one-half because of the absence of wear and tear on the equipment during the delay (Fdg. 27(a); R. 40; R. 57).

Reasons for Denying the Writ.

1. *United States* v. *Blair*, 321 U. S. 730, does not hold, as petitioner intimates, that the Government escapes liability for its own delays if the contractor completes within the original contract time. That case merely held that unless

the contract indicates such an intention, the Government was not obligated to compel one Government contractor to complete ahead of his contract time in order to enable another contractor to complete in advance of his completion date. Neither do *United States* v. *Rice*, 317 U. S. 61, and *Crook Co.* v. *United States*, 270 U. S. 4, support petitioner's position. In each of those cases, as in the Blair case, the delay was due to another Government contractor's operations, upon which, as the plaintiff knew when he executed his contract, his own operations depended.

Moreover, petitioner's interpretation would lead to absurd results. Suppose, for example, that at the outset of a contract the Government suspended performance for a month for no reason whatsoever. According to petitioner, it would be liable for damages for its delay if the contractor completed a month or more after the contract completion date, but would not be liable if the contractor completed within the contract time. Respondent cannot believe that this Court would ever lay down such a rule, rewarding the inefficient contractor and penalizing the diligent. Further, such an interpretation would, in the long run, operate against the Government's own best interests. If it should become established that the Government is entitled to needlessly protract the time of performance this contingency would necessarily be reflected in the prices received in future bids.

Even if petitioner's interpretation were correct as to contracts completed within the original contract time, there would be no reason to extend it to the present case. Here the contract was not completed until long after the contract time because of delays which petitioner now admits were its own fault. Respondent did complete the job within the time as extended by certain change orders. But the subject matter of these change orders did not substantially delay the work, and had no relation whatsoever to the delays which were held to be breaches of contract. The change orders relinquished only those "claims * * * incidental to

or as a consequence of the change herein described." The court below has found that neither party intended that the granting or acceptance of these change orders should compromise or waive any dispute arising under the contract and not relating to the subject matter of the changes. Respondent is therefore at a loss to understand why petitioner now contends that these change orders had an effect which the parties never intended. The record shows that petitioner issued the change orders for causes which did not substantially delay the work, ignoring the real delays. If it had been petitioner's intention that such change orders should waive all claims for delay, it would then appear that they were issued arbitrarily for the purpose of extending the completion time and thus absolving the Government from liability for its delays. Petitioner itself does not argue that it would escape liability under such circumstances (See footnote 3, page 7 of Petition).

2. The court below was correct in assessing as damages a proportionate share of general office overhead for the period of the delay. Petitioner emphasizes the fact that, with one exception, it was not shown that its delay caused an increase in the central office overhead. This is probably true in every case involving delay. General overhead is, in a large measure, made up of continuing items, which naturally do not vary depending on any particular job. While they are of such a nature that they cannot practicably be charged directly to any particular job, they must be borne by all of them. It is standard accounting practice to attribute home office expense to various company operations on some fair basis. Thus, it is only just, that when the Government delays a job it should be held liable for a proportionate share of the home office overhead for the period of the delay. A long line of cases has held that the Government is so liable. *Largura Construction Co.* v. *United States*, 88 C. Cls. 531, 542, 547; *Herbert M. Baruch Corp. Ltd.* v. *United States*, 93 C. Cls. 107, 126; *Struck Construction Co.* v. *United States*, 96 C. Cls. 186, 225; *Young*

Engineering Co. v. *United States,* 98 C. Cls. 310, 324. The Government presented the question to this Court in a petition to review the judgment of the Court of Claims in the case of *Brand Investment Company* v. *United States,* 102 C. Cls. 40. That petition advanced every argument against allowing a proportionate part of general office overhead that has been made in the present petition. The petition was denied. *United States* v. *Brand Investment Company,* 324 U. S. 850.

3. The court below was correct in holding that respondent did not have to show other planned use of its equipment in order to recover the rental value for the period it was rendered idle by petitioner's delay. As in most cases of delay, the contractor had no way of determining when the delay would end and could not remove the equipment from the job, and thus was in no position to plan any other use for the equipment. The decision of the Court below does not as petitioner urges, conflict in principle with *Gulf States Creosoting Co.* v. *Loving* (C.C.A. Fourth Circuit), 120 F. 2d, 195, or with *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F. 2d 823 (C.C.A. 6). Neither of those cases held that proof of other planned use for equipment was essential to recovery of its rental value. The Government presented the question to this Court in a petition to review the judgment of the Court of Claims in *Brand Investment Company* v. *United States, supra.* That petition advanced all the arguments with respect to equipment rental, including the supposed conflict between that case and *Gulf States Creosoting Co.* v. *Loving, supra,* and *Grand Trunk Western R. Co.* v. *H. W. Nelson Co., supra,* that have been made in the present petition. The petition was denied. *United States* v. *Brand Investment Company, supra.*

4. The denial of certiorari in the *Brand Investment Company* case, *supra,* shows, as to two of the questions raised in the present petition, that there is no conflict with any decision of this Court or of any federal court, and that

such questions are not of sufficient importance to require review by this Court. The third question raised in this petition, i.e., the effect of the change orders, does not appear to be of any greater importance. Petitioner does not claim that the decision below upon this question is in conflict with those of other federal courts. It has been shown that such decision is not in conflict with those of this Court. Moreover, it has been above shown that all of the questions were correctly decided by the court below.

Conclusion.

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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Attorney for Respondent.